

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

WISCONSIN ENERGY CORPORATION,)
INTEGRYS ENERGY GROUP, INC., PEOPLES)
ENERGY, LLC, THE PEOPLES GAS LIGHT)
AND COKE COMPANY, NORTH SHORE GAS)
COMPANY, ATC MANAGEMENT INC., and)
AMERICAN TRANSMISSION COMPANY LLC)

)
Application pursuant to Section 7-204 of the Public)
Utilities Act for authority to engage in a)
Reorganization, to enter into agreements with)
affiliated interests pursuant to Section 7-101, and for)
such other approvals as may be required under the)
Public Utilities Act to effectuate the Reorganization.)

Docket No. 14-0496

**JOINT APPLICANTS' RESPONSE TO THE PETITION OF GCI FOR
INTERLOCUTORY REVIEW OF THE ALJ'S DECISION LIMITING
USE OF THE LIBERTY INTERIM REPORT**

Wisconsin Energy Corporation ("Wisconsin Energy"), Integrys Energy Group, Inc. ("Integrys"), Peoples Energy, LLC ("Peoples Energy"), The Peoples Gas Light and Coke Company ("Peoples Gas"), and North Shore Gas Company ("North Shore"), together, the "Joint Applicants,"¹ hereby respond to the "Petition for Interlocutory Review of the ALJ's Decision Limiting Use of the Liberty Interim Report" ("Petition") filed by "GCI".²

INTRODUCTION

GCI's Petition is based on incorrect factual and legal premises in its challenge of the ALJ's Ruling that adopted the approach recommended by the Commission's Staff ("Staff") as to the appropriate scope for which the Liberty Interim Report being submitted by Staff should be used in this docket. The Petition falsely assumes that absent action in the present proceeding regarding the acquisition of Integrys' stock by Wisconsin Energy, the Commission will have no

¹ The Petition does not raise issues concerning ATC Management Inc. and American Transmission Company LLC. Accordingly, these parties have not participated in this Response.

² The Illinois Attorney General's Office (the "AG"), the City of Chicago (the "City"), and the Citizens Utility Board ("CUB"), together "the Governmental and Consumer Intervenors" or "GCI."

other opportunity to examine Liberty's findings or the implementation of its recommendations and that Peoples Gas will not act on Liberty's findings. This is not true. In fact, the Commission already has established a well-defined process to address the final findings and conclusions of Liberty's audit – a process the Commission ordered prior to the start of this docket.

Equally important, the Petition disregards the proper scope and purpose of this proceeding, which was initiated pursuant to Section 7-204 of the Public Utilities Act (the "Act"). 220 ILCS 5/7-204. As explained in detail below, the Commission consistently has rejected the interpretation of Section 7-204 that GCI once again raises here. Contrary to GCI's mischaracterizations (*see* Petition at p. 5), the Joint Applicants have never taken the position in this docket that improvements to the AMRP are not needed, but rather, that this docket is the wrong place to address this issue. A Section 7-204 proceeding is not the appropriate mechanism to conduct an investigation or workshop on AMRP, a multi-decades long, complicated and extensive capital infrastructure project. The ALJ's Ruling correctly applied Section 7-204 in adopting Staff's recommended approach to address the use of the Liberty Interim Report in this docket.

Finally, GCI's request to extend the date for a Commission decision in this proceeding is baseless. GCI failed to present the evidence necessary to meet the statutory criteria that must be met before the Commission can extend the statutory deadline. As discussed below, the ALJ's Ruling properly denied GCI's request for such an extension.

For these reasons, the Commission should affirm the ALJ's Ruling and deny GCI's Petition.

I. The ALJ's Ruling To Apply Staff's Approach To Address The Liberty Interim Report In This Docket Properly Applies Section 7-204 of the Act.

A. Determining Whether Improvements To Utility Operations Are Needed And How They Should Be Implemented Is Beyond The Scope of a Section 7-204 Proceeding

The ALJ's Ruling properly determined that litigating the substance of the ongoing Liberty Audit and the management and operation of Peoples Gas' AMRP are beyond the statutorily-defined scope of this Section 7-204 proceeding. Nevertheless, GCI argues that use of the Liberty Interim Report should not be limited in this proceeding because (a) the report makes findings about problems that exist with respect to Peoples Gas' past or present implementation of the AMRP, (b) the report provides recommendations regarding corrective actions, and (c) those recommendation should be addressed in this proceeding to "fix the troubled program." *See* Petition at pp. 20-21. GCI's goal of seeking improvements to the AMRP is a laudable one. Indeed, the Joint Applicants have acknowledged on numerous occasions in their testimony and other filings that improving the AMRP is a goal they share with GCI. The present proceeding, however, is not the appropriate place to evaluate the current state of the AMRP and determine how substantively to improve it.

Section 7-204 requires the Commission to determine whether a proposed reorganization, here a change in the upstream ownership of Illinois gas utilities, will adversely affect the utilities' ability to perform their duties under the Act. The specific findings that the Commission must make under Section 7-204 include that the reorganization will not "diminish" the utilities' ability to perform their duties under the Act and provide service to customers, "significantly impair" their ability to raise capital and maintain a reasonable capital structure, have a "significant adverse effect on competition" in markets over which the Commission has jurisdiction, or cause "adverse rate impacts." *See* 220 ILCS 5/7-204(b)(1), (4), (6), and (7).

Thus, as the plain language of Section 7-204 makes clear, the purpose of this proceeding is not to evaluate and determine how to improve the ongoing operations of the utility at issue in a proposed reorganization.

Indeed, the Commission has reached this conclusion in previous Section 7-204 proceedings. The Commission first addressed a proposed reorganization under Section 7-204³, in the docket involving SBC Communications, Inc. and Ameritech Corporation. *In re SBC Communications, Inc., et al.*, ICC Docket No. 98-0555, 1999 Ill. PUC LEXIS 738 (Sept. 23, 1999). There, CUB argued that Section 7-204 required the Commission to review a proposed merger under a “public interest” standard based on its general supervisory authority and Section 7-204(f)’s authority for the Commission to place conditions on its approval of a merger as “necessary to protect the interests of the public utility and its customers.” *Id.* at *21. The Commission rejected CUB’s position, stating that Section 7-204 does not require a specific “public interest” finding, and that the seven findings the Commission is required to make under Section 7-204(b) have “the very effect of . . . protect[ing] the interests of the utility and its customers.” *Id.* at *26. The Commission concluded that it is the “comprehensive directives” of Section 7-204 “and no other, that set out the scope of [the Commission’s] authority” in a Section 7-204 proceeding. In particular, with respect to Section 7-204(b)(1)’s required finding that a proposed reorganization will not diminish a utility’s ability to provide adequate, reliable, efficient, safe and least-cost public utility service, the Commission stated:

Significantly, this subsection focuses on whether the impact of the reorganization will “diminish” Ameritech Illinois’ ability to provide certain aspects of service, not on whether the merger will improve or enhance those aspects.

Id. at *43 (emphasis added).

³ Section 7-204 became effective in April 1997.

The Commission has consistently applied this interpretation of Section 7-204's appropriate scope. For example, in its Order approving the merger of GTE Corporation and Bell Atlantic Corporation, the Commission stated: "At the outset, it must be noted that the standard contained in the statute requires the Commission to evaluate whether the impact of the proposed reorganization will be to diminish service quality, not whether the proposed merger will enhance service quality." *In re GTE Corp. and Bell Atlantic Corp.*, ICC Docket No. 98-0866, 1999 Ill. PUC Lexis 825 at *28 (Oct. 29, 1999) (emphasis added). Most recently, in its final Order approving the acquisition of Nicor, Inc. by AGL Resources, Inc., the Commission confirmed this standard, stating: "The intention of the statute is to sustain the utility's service quality status quo, not to achieve quality improvements." *AGL Resources Inc., Nicor Inc., et al.*, ICC Docket No. 11-0046 (Dec. 7, 2011) Order at 13.

In light of these prior Commission conclusions, the ALJ correctly adopted Staff's proposal to limit the use of the Liberty Interim Report to prevent this proceeding from being transformed into an investigation of and workshop on how best to improve Peoples Gas' AMRP performance. Peoples Gas' AMRP, along with Liberty's investigation and the problems preliminarily identified in its Interim Report, existed prior to and independent of Wisconsin Energy's proposed acquisition of Integrys. They are issues that need to be addressed, and will be addressed in a separate proceeding, regardless of whether the upstream ownership of Peoples Gas changes. Importantly, as the Liberty Interim Report demonstrates, Peoples Gas currently is addressing these issues in collaboration with Liberty. Consequently, the ALJ's Ruling correctly keeps the inquiry concerning the Liberty Audit in this proceeding to whether Wisconsin Energy is aware of the scope and scale of the AMRP along with the remedies that may be required to that program as it "steps into the shoes" of Peoples Gas' ongoing operations and legal

obligations.

B. The ALJ's Ruling Is Consistent With The Commission's Rules And Legal Precedent

Contrary to GCI's arguments, the Commission's rules and legal precedent support the ALJ's decision to limit the purposes for which the Liberty Interim Report would be allowed to be used in this proceeding. First, Section 200.610 of the Commission's rules requires the exclusion of "irrelevant, immaterial or unduly repetitious evidence." 83 Ill. Admin. Code § 200.610(a). Because, as demonstrated above, substantive questions about what may need to be improved with respect to Peoples Gas' implementation and management of the AMRP are not relevant or material to the determinations the Commission must make under Section 7-204, the ALJ's Ruling properly enforces Section 200.610(a). This is consistent with the Supreme Court of Illinois' holding in *Illinois Central Railroad Co v. Illinois Commerce Commission*, 398 Ill. 19, 25-26 (1947), that "[t]he evidence should be limited to the issue" to be decided by the Commission in the proceeding before it. *Accord In re Commonwealth Edison Co.*, ICC Docket Nos. 83-0537; 84-0555, 1989 Ill PUC LEXIS 277, at *141 (Aug. 23, 1989) (ruling that where hearings were held for the limited purpose of providing the Commission with calculations of the utility's revenue requirement for very specific scenarios, it was appropriate to exclude evidence that was not within the scope of the calculations at issue in those hearings).

Moreover, both courts and the Commission properly may allow a piece of evidence to be used for limited purposes only. For example, where evidence of a party's prior rule violations is not relevant to and may not be admitted to show that the party acted negligently in a particular instance, such evidence could be relevant and admissible to demonstrate that party's knowledge of and disregard for dangerous conditions where the willfulness of the party's conduct is an issue in the case. *See Churchill v. Norfolk & Western Ry. Co.*, 73 Ill. 2d 127, 142-143 (1978). In *In re*

Central Illinois Public Service Company, ICC Docket No. 91-0193, 1992 Ill. PUC LEXIS 81, at *130-131 (Mar. 18, 1992), the Commission ruled that it was appropriate to allow a study prepared by one of the utility's witnesses which calculated a level of cash working capital to be used only for the limited purpose of rebutting evidence submitted by an intervenor's witness recommending a negative working capital adjustment.

In addition, contrary to GCI's assertions (*see* Petition at pp. 13-15), the Illinois Rules of Evidence ("IRE") do not "impel" the unlimited admission of the Interim Report. IRE 105 provides that when evidence which is admissible "for one purpose," the tribunal "shall restrict the evidence to its proper purpose or scope" Further, in order for evidence to be admissible as "relevant" under IRE 402, it must be related to a "fact that is of consequence to the determination of the action." IRE 401 (emphasis added). For the reasons discussed above, the substance of the Interim Report's findings and conclusions do not relate to a fact that is "of consequence" for the Commission's determinations to be made under Section 7-204 in this proceeding. Also, the preliminary nature of the Interim Report's findings and recommendations discussed above create the danger of unfair prejudice and confusion of the issues, which would be an independent ground for exclusion or limitation of this evidence. IRE 403.

The ALJ's Ruling limiting the use of the Liberty Interim Report based on the proper scope of a Section 7-204 proceeding as recommended by Staff is consistent with the Commission's rules and legal precedent. Accordingly, the Commission should affirm the ALJ's Ruling and deny the Petition.

II. The Liberty Interim Report's Findings And Recommendations Are Preliminary And The Present Proceeding Is Not The Appropriate Procedural Vehicle For The Commission To Evaluate And Address Their Implementation

The Joint Applicants agree that it will be important to address the substantive findings and recommendations made by Liberty, but the proper venue for doing so is in the procedures

provided for by the Commission in its *Peoples Gas 2012 Rate Case* Order, not in this Section 7-204 proceeding. Putting aside that the substantive discussions in the Liberty Interim Audit are beyond the legal scope of Section 7-204, addressing them here also would be premature and duplicative. Moreover, contrary to the impression suggested by GCI's Petition, Peoples Gas is responding to Liberty's preliminary findings, and the evidence in this proceeding establishes that approval of the proposed Reorganization will not adversely impact or delay the implementation of Liberty's recommendations.

As GCI acknowledges, the Commission initiated Liberty's investigation in its June 18, 2013 final Order issued in Peoples Gas' 2012 rate case.⁴ In that Order the Commission established a process and procedure by which the audit would be performed and subsequently reviewed. The audit would be a "two-phase investigation of the AMRP . . . ending in a public document report" to be conducted as described by Staff witness Roy Buxton's rebuttal testimony submitted in that proceeding. *Id.* at 61. Phase I would consist of the investigation itself and result in a final investigation report to be published on the Commission's website and placed in the record of "a future Peoples [Gas] rate case," with supporting testimony from the engineering consultant (*i.e.*, Liberty). Phase II would consist of a two-year verification period in which Liberty worked to verify that Peoples Gas implemented the recommendations from the Phase I investigation. Subsequently, Liberty would submit testimony in support of the final report of the two-year Phase II verification process in a future Peoples Gas rate case.⁵

This Commission-ordered procedure is ongoing. The Joint Applicants recognize the

⁴ *North Shore Gas Co., The Peoples Gas Light and Coke Co. – Proposed General Increase in Rates*, ICC Docket Nos. 12-0511/12-0512 (cons.), Order (June 18, 2013) at 61 (hereinafter referenced as "*Peoples Gas 2012 Rate Case*").

⁵ The details concerning the scope and process for Liberty's investigation ordered by the Commission is contained in the testimony of Staff witness Mr. Roy Buxton that was incorporated by the Commission into its *Peoples Gas 2012 Rate Case* Order. A copy of the relevant testimony was attached as Exhibit 1 to the Response of Joint Applicants to Illinois Attorney General's and City of Chicago's Motion to Extend Schedule, filed on January 12, 2015.

importance of the investigation and welcome the opportunity to address any of the findings and recommendations that result from Liberty's investigation when it is completed. However, shoe-horning a preliminary component of the Liberty Audit before the investigation will be completed into this reorganization proceeding is contrary to the audit's intended purpose and the procedure for its use established by the Commission, as well as duplicative and unnecessary. Simply put, GCI's inference that this proceeding will provide the Commission with its only opportunity to address the Liberty Audit recommendations and their implementation is not true.

Alternatively, if the Commission is concerned about ensuring that there is a venue for the parties to address the results of Liberty's investigation phase before Peoples Gas' next rate case, a better option would be for the Commission to initiate a separate docket for the purposes of examining the Liberty investigation report. Opening such a docket would provide an orderly and comprehensive means for the Commission, the Joint Applicants, Staff, and interested parties that choose to intervene in that proceeding to address any concerns raised by the Liberty investigation report without the statutory deadline and limitations of Section 7-204 to worry about. This alternative also would prevent compromising the purpose of the present Section 7-204 proceeding. Moreover, any order issued by the Commission in such a separate docket would be binding on Peoples Gas whether or not there is a change in the corporate ownership of the utility approved in this proceeding. *See* 220 ILCS 5/7-204(b)(5); JA Ex. 1.0 at 16.

GCI seek to depart from the Commission's established procedures for the Liberty Audit by claiming that the Interim Report contains findings and recommendations requiring "immediate attention" that cannot wait for the Commission's established process to be played out. (*See* Petition at pp. 7-8) Even if true, however, matters requiring "immediate" attention are issues for Peoples Gas' current management and are not relevant to the proposed Reorganization

because they must be addressed regardless of Peoples Gas' ownership.

Moreover, the Liberty Interim Report itself details many initiatives and actions that Peoples Gas' management is taking right now in response to Liberty's preliminary findings and recommendations. In light of these actions, GCI's professed alarm that Liberty's recommendations are not being acted upon ignores that Liberty and Peoples Gas are following the Commission-defined process and taking appropriate action. Not mentioned in GCI's Petition is Liberty's statement that an impetus in its decision to prepare the Interim Report was [REDACTED]

[REDACTED] (Interim Report, at p. 2) These changes include specific actions and initiatives to address Liberty's recommendations in the areas of [REDACTED]

[REDACTED], as well as [REDACTED]

[REDACTED]. (See Interim Report, at pp. 8-9, 13-14, 18, 23, 25-28, Appendix B) Thus, no inertia or delay exists in working to improve Peoples Gas' AMRP.⁶

Further, in his testimony submitted pursuant to the ALJ's Ruling, Wisconsin Energy's president, Mr. Allen Leverett, testified that he and other members of Wisconsin Energy's management reviewed the Liberty Interim Report, that Wisconsin Energy agrees that there should be no delay in any efforts or actions to improve the management and implementation of the AMRP, that Wisconsin Energy would [REDACTED]

[REDACTED], and after close of the Reorganization will fully support the

⁶ GCI's call for "immediate" action and efforts to force consideration of AMRP issues into the limited window a Section 7-204 proceeding provides for the Commission is further belied by GCI's acknowledgement that the AMRP is a "decades-long, multi-billion dollar capital project." (See Petition at pp. 5 and n. 5, 19) Given the length, scope and importance of the AMRP, a substantive evaluation of the Liberty investigation and its recommendations should be performed in an orderly, comprehensive manner giving it the full consideration it is due. Rushing to have the Commission perform a hurried analysis now before the investigation is even completed for a project that will last decades would not be reasonable or prudent.

commitments and initiatives that have been taken by Integrys and Peoples Gas. (JA Ex. 12.0, at 5-6) Also, while GCI attempts to rely on references in the Interim Report to [REDACTED]

[REDACTED], GCI ignores the fact that the Interim Audit concluded that [REDACTED].

(See Interim Report at pp. 2-3, 10-11) In any event, this would be an issue regarding current management, and not an impact that approval of the Reorganization would have on existing service quality that is at issue in this proceeding.

Moreover, Staff appropriately reminds all that Liberty's Interim Report is preliminary and subject to change. Staff witness Mr. Harold Stoller, to whom Liberty reports on the progress of its investigation, testified that the Liberty Interim Report contains findings and recommendations that are, in fact, preliminary and could change significantly. (ICC Staff Ex. 8.0, at 10:176-180) Yet, in order to cobble together support for its flawed argument, GCI works to cast these preliminary findings as final, then speculates that it is "unrealistic" to believe that Liberty's findings and recommendations could change significantly. GCI's assertion lacks any evidentiary support and is contradicted by the Interim Report's own authors. Liberty prefaces its Interim Report with the following language:

[REDACTED]

(Liberty Interim Report, p. S-1 (emphasis added)) Thus, Mr. Stoller's testimony was not based on speculation, but rather, Liberty's own caution that [REDACTED]

[REDACTED]. This is yet another reason why the ALJ properly limited the purposes for which the Interim Report can be used in this proceeding, prohibiting a substantive evaluation of preliminary findings and recommendations that Liberty itself may change in its final report.

Accordingly, the Commission should affirm the ALJ's Ruling and deny GCI's Petition.

III. The ALJ Properly Denied An Extension Of The Deadline For Approval Of The Proposed Reorganization Under Section 7-204(d)

The ALJ correctly denied GCI's motion to extend the deadline for approval of the proposed Reorganization by three months. As discussed above, the purpose for which GCI want an extension of the approval deadline – to examine Liberty's investigation in detail so the Commission can ensure that the merger will result in a "fix" of the AMRP – is incompatible with the scope of Section 7-204, as well as duplicative and unnecessary. Moreover, GCI's Petition fails even to address the statutory standard that must be met before the Commission can take the extraordinary step of delaying its decision on whether or not to approve the proposed Reorganization. As reflected in the ALJ's Ruling, GCI cannot come close to making the showing necessary to cause the Commission to delay action in this proceeding.

Section 7-204(d) of the Act requires the Commission to enter an Order in this proceeding within 11 months, subject to limited exceptions. Section 7-204(d)'s limited exceptions allow the Commission to extend the 11-month time limit for up to three months either to consider amendments to the Joint Applicants' filing or to consider "reasonably unforeseeable changes in circumstances" subsequent to the Joint Applicants' initial filing. The Joint Applicants have not made any amendments to their August 6, 2014 filing and no "unforeseeable changes in circumstances" have occurred since that initial filing. Thus, Section 7-204(d)'s threshold requirements for an extension of the statutory deadline for determining whether to approve the

proposed Reorganization in this proceeding have not been met.⁷

The grounds upon which GCI request an extension – to allow Liberty’s Interim Report and final report to be made part of the record, along with testimony about those documents (*see* Petition at p. 21) – do not establish that any “unforeseeable changes in circumstances” have occurred since this proceeding was initiated. The Commission directed that the investigation being conducted by Liberty be undertaken in its *Peoples Gas 2012 Rate Case* final Order issued on June 18, 2013, in response to testimony from Staff, the AG, and the City regarding Peoples Gas’ implementation of the AMRP. *See Peoples Gas 2012 Rate Case* Order at 46-61. The Commission ordered that the audit be a “two-phase investigation of the AMRP . . . ending in a public document report” to be conducted as described by Staff witness Roy Buxton’s rebuttal testimony submitted in that proceeding. *Id.* at 61. Thus, the process for and pendency of the Liberty Audit was known for *over a year* prior to the Joint Applicants filing their Application on August 6, 2014. Regardless of whether or not the Liberty audit is relevant to the Commission’s consideration of the proposed Reorganization, its pendency and the reports to be issued as a result of the audit cannot be said to be “unforeseen” or even a change in circumstances. To the contrary, Liberty’s investigation is a circumstance that was in place well before the Application initiating this proceeding was filed, with a Commission-established process for how its final report and recommendations are to be implemented and addressed by the Commission.

The Commission, therefore, should deny GCI’s requested extension of Section 7-204(d)’s requirement that a decision in this proceeding be issued within 11 months after the filing of the

⁷ In their Petition (at pp. 21-22), GCI reference Section 7-204(e) as support for their request for an extension of the statutory deadline in this proceeding. Subsection (e) does not provide for extensions of the statutory deadline for approval of a proposed reorganization – it establishes that Section 7-204 provides the exclusive requirements for Commission approval of mergers subject to this section. Even assuming that GCI’s reference to subsection (e) was a typographical error, nowhere in their Petition does GCI attempt to show that the requirements for an extension of the deadline under Section 7-204(d) exist in the present proceeding.

Application on August 6, 2014.

CONCLUSION


For the foregoing reasons, the Commission should deny GCI's Petition for Interlocutory Review of the ALJ's Decision Limiting Use of the Liberty Interim Report.

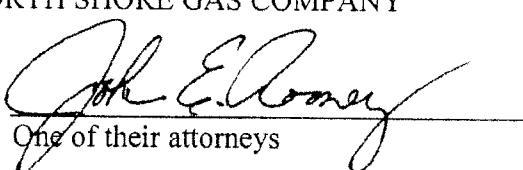
Dated: February 11, 2015

Respectfully Submitted,

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